SAUJANA HOTEL SDN BHD

v.

KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[CIVIL APPEAL NO: R2-14-06-2009]
5 JANUARY 2011

REVENUE LAW: *Income Tax - Promotion of investments - Industrial building allowance - Appellant granted investment tax allowance and industrial building allowance- Duration of investment tax allowance allowed for five years - Claim for - Whether entitlement for industrial building allowance can continue upon expiration of investment tax allowance - Factors to consider - Promotion of Investments Act 1986, ss. 19, 27 & 30*

The five-star Saujana Hotel complex, owned and managed by the appellant, was renovated with additional guestrooms and improved infrastructure. Pursuant to the hotel's expansion, the appellant applied to the relevant Ministry under s. 27 of the Promotion of Investments Act 1986 ('PIA') for an investment tax allowance and was granted such an allowance for five years from 31 January 1992. Since s. 30 of the PIA entitled the appellant to industrial building allowance as well, it claimed for that allowance from 1993 and continued to so claim even after its entitlement to the investment tax allowance expired on 30 January 1997. The respondent allowed the claim for industrial building allowance only from 1993 till 1997 and disallowed it upon expiration of the investment tax allowance. The appellant contended that neither s. 27 nor s. 30 of the PIA prescribed that the entitlement to building tax allowance ceased upon the expiry of the investment tax allowance. Dissatisfied with the respondent's decision, the appellant appealed to the Special Commissioners of Income Tax ('SCIT') wherein the respondent's decision was upheld. Hence this appeal by the appellant against the SCIT's decision. The issue that arose for determination was whether the SCIT's decision that the appellant may not claim industrial building allowance upon the expiration of investment tax allowance was correct in law.

Held (allowing the appeal with costs):

(1) The entitlement to industrial building allowance could not be restricted to the duration of the investment tax allowance. The SCIT and the respondent could not act beyond their powers to prescribe the time limit for which the industrial building allowance should be allowed. (para 19)

(2) If Parliament had intended the industrial building allowance to be restricted only to the period when the investment tax allowance was available, it would have specified this clearly in the PIA. Sections 19, 27 and 30 of the PIA were silent on this point. (para 12)

(3) Section 30 of the PIA must be interpreted in the spirit and intendment of the Act. The granting of the investment tax allowance and industrial building allowance was consistent with the PIA's objective to promote industrialisation as the catalyst to boost economic development in the country. (para 22)

(4) There was no legal basis for the SCIT to rule that the appellant needed to be a pioneer company pursuant to s. 19 of the PIA to be eligible for industrial building allowance when, in fact, the appellant was entitled to that allowance under s. 30 and not s. 19. (paras 30 & 31).

(5) The SCIT had erred in inferring that the appellant's entitlement for industrial building allowance had expired. Applying the rate granted for such allowance, the appellant's entitlement for it was for 45 years from 1993 until the total qualifying expenditure had been fully set-off. (paras 32 & 36)

Case(s) referred to:

Bradlaugh v. Clark [1883] 8 AC 354 ***(refd)***

CIR v. Challenge Corporation Ltd [1986] STC 548 ***(refd)***

Director-General of Inland Revenue v. Rakyat Berjaya Sdn Bhd [1984] 1 CLJ 219; [1984] 1 CLJ (Rep) 108 FC ***(refd)***

Director General of Inland Revenue v. Sebangun Sdn Bhd [1997] 1 LNS 270 HC ***(refd)***

GASMSB v. KPHDN [1996] 1 BLJ 358 ***(foll)***

Lim Foo Yong Sdn Bhd v. The Comptroller-General of Inland Revenue [1986] 2 CLJ 182; [1986] CLJ (Rep) 1 PC ***(refd)***

Mamor Sdn Bhd v. Director General of Inland Revenue [1979] 1 LNS 145 ***(refd)***

Nasiruddin and others v. Sita Ram Agrawal [2003] 2 SCC 577 ***(refd)***

Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***
Sabah Berjaya Sdn Bhd v. Ketua Pengarah Jabatan Hasil Dalam Negeri [1999] 3 CLJ 587 CA ***(refd)***
South India Paper Mills Ltd v. Director of Inspection and Audit (Customs and Central Excise) and Anr [1984] 145 Inter Alia 194 (KAR) ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 44(6)
Promotion of Investments Act 1986, ss. 19, 27, 29A(3)(b), 30

For the appellant - Datuk DP Naban (S Saravana Kumar with him); M/s Lee Hishammuddin Allen & Gledhill
For the respondent - Wan Hamdanie Wan Mohamed; FC, Inland Revenue Board

Reported by Ashok Kumar

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

[1] This is an appeal by the appellant by way of case stated against the deciding order issued by the Special Commissioners of Income Tax ("SCIT") on 17 September 2008. The SCIT held that the appellant may not continue to claim industrial building allowance upon the expiration of the investment tax allowance granted to the appellant.

[2] Having seriously considered the submissions of both parties and the record presented in the case stated, the court is of the view that the appeal is impressed with merit.

Brief Of Facts

[3] The brief facts as agreed and stated by the SCIT are as follows:

(a) The appellant owns and manages Saujana Hotel, a hotel of approved standard by the Ministry of Tourism and classified as a 5-star hotel.

(b) The appellant expanded its hotel business by constructing 170 additional guestrooms and other infrastructures such as sewerage facilities, drain, roads, car park, footpath and fencing.

(c) Pursuant to the hotel expansion, the appellant applied for investment tax allowance pursuant to s. 27 of the Promotion of Investments Act 1986 ("PIA") from the Ministry of International Trade & Industry ("MITI"). The application was approved on 20 January 1997. Investment tax allowance was granted for five years effective from 31 January 1992 and it expired on 30 January 1997.

(d) By virtue of s. 30 of the PIA, the appellant was also entitled to industrial building allowance. The appellant claimed industrial building allowance from the year of assessment ("YA") 1993 and continued to claim industrial building allowance despite the expiration of investment tax allowance on 30 January 1997. The respondent allowed the appellant to claim industrial building allowance for the years 1993 to 1997.

(e) However, the respondent disallowed the appellant's industrial building allowance claim upon the expiration of the investment tax allowance.

(f) The appellant disagreed with the respondent's view as neither s. 27 nor s. 30 of the PIA prescribes that industrial building allowance must cease upon the expiration of investment tax allowance.

Issue To Be Decided

[4] The sole issue for determination before this court is whether the SCIT's decision that the appellant may not claim industrial building allowance upon the expiration of investment tax allowance is correct in law.

Appellant's Submission

[5] The nub of the appellant's submission is that s. 30 of the PIA does not provide that industrial building allowance must cease upon the expiration of investment tax allowance. The appellant was granted investment tax allowance pursuant to s. 27 of the PIA. Thus, by virtue of s. 30 of the PIA, the hotel owned by the appellant was treated as an industrial building and the appellant became eligible for industrial building allowance.

[6] The appellant further submits that the SCIT and respondent's ruling that the industrial building allowance claimed by the appellant pursuant to s. 30 of the PIA expired upon the cessation of the investment tax allowance is without any basis as s. 30 does not provide for this.

Respondent's Submission

[7] The respondent submits that the appellant is not entitled to continue claiming industrial building allowance on the residual value of the qualifying capital expenditure since the investment tax allowance granted to the applicant had expired on 30 January 1997. The respondent responded to the appellant's submission by citing the findings of the SCIT. The SCIT found that allowance to extend/modernise existing hotel business under the PIA, the appellant had been granted investment tax allowance by the minister under s. 27 of the PIA for the period of five (5) years effective from 31 January 1992 and it expired on 30 January 1997. Therefore, since the appellant's hotel is not an industrial building by virtue of para. 65(3), Schedule 3 of the ITA, it is deemed that s. 19 of the PIA is applicable where the appellant is entitled to claim industrial building allowance for the period of five (5) years only.

Findings Of The Court

[8] It is trite that it is open for the High Court to review the decision of SCIT, if SCIT:

(a) misdirect themselves on the law;

(b) answer the wrong question;

(c) omit to answer a question which they ought to have answered;

(d) took into account factors which they ought not to have;

(e) reached a conclusion on facts which is not supported by the evidence before them; and

(f) made a finding of facts which no reasonable person in the circumstance would have arrived at.

(see *Mamor Sdn Bhd v. Director General of Inland Revenue* [1979] 1 LNS 145 (upheld on appeal by the Privy Council) and the Privy Council case of *Lim Foo Yong Sdn Bhd v. The Comptroller-General of Inland Revenue* [1986] 2 CLJ 182; [1986] CLJ (Rep) 1).

[9] In *Director-General of Inland Revenue v. Rakyat Berjaya Sdn Bhd* [1984] 1 CLJ 219; [1984] 1 CLJ (Rep) 108, the Federal Court held that the terms "question of law" includes the correctness of (a) pure statements of law (statutory provision) and (b) inferring of a conclusion from primary facts (where the process of inference involves assumptions as to the legal effect or consequences of the primary facts).

[10] The crux of this appeal lies on the interpretation of s. 30 of the PIA which reads as follows:

> (30) Where a hotel business is carried on in Malaysia by a company granted an approval under section 27 in an hotel building of the approved standard or in the extended or modernized part of an existing hotel building where such extension or modernization is of an approved standard, section 19 shall apply, *mutatis mutandis*, to that hotel building or such extended or modernized part thereof.

[11] For convenience, I reproduced herein below ss. 27 and 19 of the PIA:

> (27) The Minister may grant approval in respect of an application for an investment tax allowance made under subsection 26(1) subject to such terms and conditions as he deems fit, and such approval may be granted retrospectively from a date not earlier than the date from which the activity or the product has been determined to be a promoted activity or a promoted product under section 4.

Section 19 of the PIA provides as follows:

> 19(1) Where a company has incurred capital expenditure on a hotel building of the approved standard in Malaysia or incurred capital expenditure in extending or modernizing an existing hotel building to the approved standard in Malaysia, and hotel business is carried on in that building by a pioneer company, such hotel building or such extended or modernized part thereof, as the case may be, shall notwithstanding subparagraph 65(3) of Schedule 3 of the principal Act be deemed to be an industrial building for the purpose of the Schedule.

[12] The court agrees with the submission of the appellant that ss. 19, 27 and 30 of the PIA are silent as to whether industrial building allowance expires upon the cassation of investment tax allowance. If Parliament intended industrial building allowance to be restricted only to the period where the investment tax allowance was available, then, Parliament would have specified this clearly in the PIA, especially in s. 29A. For instance, s. 29A(3)(b) clearly states that investment tax allowance granted after 1 November 1991 is to last for 5 (five) years only.

Statutory Construction

[13] The cardinal rule of statutory interpretation is to ascertain the intent of the legislature. A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. The determination of legislative intent is a matter of law.

[14] The legislature's intent should be ascertained primarily from the plain language of the statute. The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. Once the legislature has made a choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy.

[15] Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language. The court must apply those words according to their literal meaning. What a legislature says in the text of a statute is considered the best evidence of the legislature intent or will. It is not the court's place to change the meaning of a clear and unambiguous statute.

[16] Where the words of statute is clearly conveyed there is no scope to innovate or take upon itself the task of amending or altering statutory provisions. In this connection, Supreme Court of India has made a very clear statement in the case of *Nasiruddin and others v. Sita Ram Agrawal* [2003] 2 SCC 577 in the following terms:

> 37. The court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot rewrite or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used. It may be true that use of the expression "shall or may" is not decisive for arriving at a finding as to whether statute is directory or mandatory. But the intention of the legislature must be found out from the scheme of the Act. It is also equally well settled that when negative words are used the courts will presume that the intention of the legislature was that the provisions should be mandatory in character.

[17] Even if there exist same ambiguity in the language or the same is capable of two interpretations, it is trite the interpretation which serves the object and purport of the Act must be given effect to. In such a case the doctrine of purposive construction should be adopted.

[18] In *South India Paper Mills Ltd v. Director of Inspection and Audit (Customs and Central Excise) and Anr* [1984] 145 INTER ALIA 194 (KAR), the Indian High Court held that:

> When Parliament has not prescribed any period of limitation for claiming the benefits under this chapter it is not open to the Central Govt. to transgress beyond its power to prescribe the time-limit in order to avail of the benefit of the scheme. (emphasis added)

[19] In this regard, the SCIT and respondent cannot act beyond its power to prescribe the time limit in which the industrial building allowance should be allowed. Hence, the entitlement of industrial building allowance cannot be restricted to the duration of investment tax allowance.

[20] Further, since Parliament did not expressly limit the period for which industrial building allowance is available in ss. 19 and 30, to include such limitation period into the provisions would be re-writing provisions of those sections. The Federal Court in *Palm Oil*

Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 commented "... If this court were to accept the argument of counsel for the appellant, then **we would not be promoting the purpose or object of the 1979 Act but be defeating it.** For, in such event we would, through unauthorized legislative power, be re-writing statute". (emphasis added)

[21] Lord Blackburn in *Bradlaugh v. Clark* [1883] 8 AC 354 had this to say:

> All statutes are to be construed by the Courts so as to give effect to the intention which is expressed by the words used in the statute. But that is not to be discovered by considering those words in the abstract, but by inquiring what is the intention expressed by those words used in a statute with reference to the subject-matter and for the object which that statute was made; it being a question to be determined by the Court, and a very important one which was the object for which it appears that the statute was made. The meaning of the words is to be found not so much in strict etymological propriety of language, or even in popular use, as in the subject or occasion on which they are used and the object that is intended to be attained. The subject-matter with which the legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the legislature in passing the Act.

[22] Therefore, s. 30 of the PIA must be interpreted in the spirit and intendment of the legislation. The PIA is part of the tax incentives measures by the government to promote and stimulate industrialisation and manufacturing as the core of the Malaysian economy. The granting of the investment tax allowance and industrial building allowance is consistent with the objective of the PIA to promote industrialisation as the catalyst to boost economic development. This received judicial acknowledgement in *Director General of Inland Revenue v. Sebangun Sdn Bhd* [1997] 1 LNS 270, where Justice Muhammad Kamil Awang commented:

> In the early 1980s the Government *in its effort to turn the economy of the country from an agricultural based to that of industrialisation had introduced many novel things or steps:* and some of which were taken through legislation. Thus *in pursuance of this policy that the Promotion of Investments Act 1986 was conceived,* which replaced the Investment Incentive Act 1968 and which *makes provision for promotion by way of relief from income tax the establishment and*

A *development in Malaysia of Industrial, agricultural and other commercial enterprises, the promotion of exports or incidental and related purposes* ... (emphasis added)

[23] Justice Gopal Sri Ram in the Court of Appeal case of *Sabah Berjaya Sdn Bhd v. Ketua Pengarah Jabatan Hasil Dalam Negeri* [1999] 3 CLJ 587 endorsed and applied the principle that a taxpayer may mitigate his tax incidence by utilising the tax relief schemes granted by Parliament. In *Sabah Berjaya*, the Court of Appeal unanimously ruled that the taxpayer is entitled to utilize of the tax benefit granted under s. 44(6) of the Income Tax Act 1967 ("ITA"). Their Lordships endorsed the decision of Lord Templeman in the Privy Council case of *CIR v. Challenge Corporation Ltd* [1986] STC 548, where it was held that tax benefits resulting from specific tax relief provisions enacted by Parliament do not amount to tax avoidance.

[24] One of the reasons of why the SCIT had dismissed the appeal is that the appellant was wrongly or unfairly taking the advantage of s. 27 or s. 30 of the PIA. If the court were to accept the SCIT's reasoning in this respect, the purpose or object of the PIA, which is to promote economic growth will not be promoted. Paragraph 6(ii) of the Case Stated clearly illustrates that the appellant expanded its hotel business to promote the tourism industry in Malaysia, which is in line with the purpose of PIA as observed in *Sebangun (supra)*. There is no evidence in the statement of agreed facts or the facts found by the SCIT to establish the applicant took advantage of the PIA.

[25] The SCIT also came to the conclusion that as the appellant did have an industrial building, it applied to MITI under s. 27 of the PIA. With respect, the SCIT had misconstrued the law. The purpose of the appellant's application under s. 27 of the PIA was to obtain investment tax allowance. It was not an application to obtain industrial building status for the hotel as held by the SCIT. This is apparent from the documentary evidence tendered and the wordings of s. 27 itself. Section 27 reads:

> The Minister may **grant approval in respect of an application** for an investment tax allowance made under section 26(1) subject to such terms and conditions as he deems fit, and such approval may be granted retrospectively from a date not earlier than the date from which the activity or the product has been determined to be a promoted activity or a promoted product under section 4 ... (emphasis added)

[26] There is nothing in s. 27 in relation to industrial building or industrial building allowance. It is clear that s. 27 is all about the granting of investment tax allowance. The SCIT had clearly misconstrued the scope of s. 27 and misunderstood the true purpose of why the applicant applied for s. 27. The appellant's application under s. 27 was to obtain investment tax allowance and not because the hotel was not an industrial building.

[27] The SCIT also ruled that s. 19 of the PIA is only applicable if the appellant is run by a pioneer company. With respect, the SCIT had clearly failed to appreciate that the appellant need not be a pioneer company to be eligible for industrial building allowance. They also failed to understand the scope of s. 30 of the PIA, which states that s. 19 applies *"mutatis mutandis"* in instances where a taxpayer had been granted investment tax allowance under s. 27.

[28] It must be noted that the applicant relied on s. 30 to claim for industrial building allowance and not s. 19. Being a company granted investment tax allowance, the appellant fell within the ambit of s. 30 and not s. 19. Section 30 states that s. 19 shall apply *mutatis mutandis* to a company granted an approval under s. 30. The maxim *"mutatis mutandis"* means "with the necessary changes in point of details". (see *Jowitt's Dictionary of English Law*).

[29] Thus, applying the maxim *"mutatis mutandis"*, the words "pioneer company" in s. 19 are changed to "a company which if granted an approval under s. 27" for the purposes of construing s. 30.

[30] Further, if one were to follow the SCIT's decision that s. 19 does not apply because the appellant is not a pioneer company, then, on what basis did the respondent allow the appellant to claim industrial building allowance for the years of assessment 1993 to 1997? There is no legal basis for the SCIT to rule that the appellant needs to be a pioneer company pursuant to s. 19 when in actual fact, the appellant relied on s. 30 to claim industrial building allowance.

[31] It would appear that the SCIT had misconceived the meaning of *"mutatis mutandis"* by ignoring the fact that the appellant was entitled to industrial building allowance under s. 30 and not s. 19. With respect, the SCIT had made a fundamental flaw in the interpretation of s. 30.

[32] SCIT also is of the opinion that there is no provision that allows one to claim industrial building allowance where the period for it had expired. Again with respect, the SCIT misdirected themselves here. In the present case, the appellant's industrial building allowance claim had yet to expire as they only started to claim the said allowance in 1993. Applying the rate granted for industrial building allowance, the appellant's entitlement for industrial building allowance was for 45 years from 1993. The SCIT had erred by inferring that the appellant's entitlement for industrial building allowance had expired.

[33] In *GASMSB v. KPHDN* [1996] 1 BLJ 358, the Special Commissioners stated that:

> ... The Capital Allowance and Industrial Building Allowance are calculated for a year of assessment and are deducted from the adjusted income from the business in arriving at the statutory income. *The allowances are calculated by reference to the estimated useful life of the asset which is reflected in the rates prescribed by the Director-General of Inland Revenue. The allowances commence in the year when the expenditure is incurred and continue to be given in subsequent years until the qualifying expenditure is fully set-off* or the asset is disposed. The allowances due for each year of assessment (are) calculated on the written down value or residual expenditure of the asset ... (emphasis added)

[34] Although *GASMSB* concerns the issue on capital allowance, the same principle applies for industrial building allowance as the latter is a sub-set of capital allowance and both are governed under Schedule 3 of the ITA. If the SCIT's reasoning is to be followed, then it means that the appellant had only claimed a total of 20% (initial allowance of 10% and 2% annual allowance between 1993 and 1997) of the total industrial building allowance that it is entitled to. This cannot be the intention of the Parliament.

[35] In legislating and introducing industrial building allowance *via* s. 30 of the PIA, Parliament would have certainly known it will take a taxpayer like the appellant a period of 45 years to exhaust the allowance granted to it. The construction finds support from the following observation made by the High Court in *Sebangun (supra)*:

> In *Lim Phin Khiah v. Kho Su Ming* [1996] 1 MLJ 1 the Federal Court said that there is an unrebuttable presumption Parliament is presumed to know all the relevant law upon the particular subject upon which it legislates. The correct approach is to look at the substance amid general purpose of the legislation in order to discover its objective aim or general purpose ...

[36] Pursuant to Schedule 3 of the ITA and the observation made in *GASMSB*, it is only logical that the appellant is entitled to claim industrial building allowance until the total qualifying expenditure has been exhausted. In addition, it is also recognized by the Malaysian Industrial Development authority ("MIDA"), one of the authorities under MITI, that the industrial building allowance is available until it is fully exhausted. In one of the MIDA's booklet, it states that:

> An Industrial building allowance is granted to companies incurring capital expenditure on the construction or purchase of a building that is used for specific purposes, including ... hotels that are registered with the Ministry of Tourism. *Such companies are eligible for an initial allowance of 10% and an annual allowance of 3%. As such, the expenditure can be written off in 30 years.* (emphasis added)

Conclusion

[37] Based on the reasons above stated, the appellant is entitled to continue claiming industrial building allowance although the investment tax allowance granted to the appellant had expired.

[38] I would allow the appeal with costs.